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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the Congress intended to allow the conviction of a corporation for a specific intent crime in the absence of evidence that any of its employees consciously chose to violate the law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
Collective Knowledge	7
Flagrant Indifference	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:	Page
Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951)	9
Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. Dist. Ct. App. 1969)	11
Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961)	7
United States v. Sawyer Transport, Inc., 337 F. Supp. 29 (D. Minn. 1971)	9
United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730 (W.D. Va. 1974)	9
United States v. Banco Cafetero Panama, 797 F.2d 1154 (2nd Cir. 1986)	9,10
STATUTES:	
12 U.S.C. §§ 3401-3422	7
18 U.S.C. 215	6
18 U.S.C. 1956	6
18 U.S.C. 1957	6
18 U.S.C. 1344	6
21 U.S.C. 881	9
31 U.S.C. 5311-22	1
31 U.S.C. 5321(a)(6)	5
31 U.S.C 5322	7
LEGISLATIVE MATERIAL:	
H.R. Rep. 99-746, Comprehensive Money Laundering Prevention Act (1986)	4
H. R. Rep. 99-855, Money Laundering Control Act of 1986 (1986)	4
S. Rep. 99-433, The Money Laundering Crimes Act of 1986 (1986)	4

Table of Authorities Continued

Page

MISCELLANEOUS:

Statement of Honorable John M. Walker, Assistant Secretary for Enforcement and Operations, Department of the Treasury, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking, Finance and Urban Affairs (July 13, 1986) 4

The President's Commission on Organized Crime, Interim Report, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984) 4

J. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement* (1987) 6,8,9

K. Brickey, *Corporate Criminal Liability* (1984) 9

L. Fischer, *The Law of Financial Privacy: A Compliance Guide* (1983) 11

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge the Court to grant the Petition for Writ of Certiorari in order to review a decision of the United States Court of Appeals for the First Circuit.

That decision upheld a jury verdict convicting the Bank of New England of thirty-one violations of the Currency Transaction Act, 31 U.S.C. Sections 5311 to 5322 (1982). The Act, better known as the Bank Secrecy Act, and its implementing regulations require

financial institutions to report individual withdrawals or deposits involving $10,000 or more to the Secretary of the Treasury on Treasury Department-designed forms called currency transaction reports or "CTRs." In order to avoid reports to the Treasury by financial institutions, some enterprising individuals have broken up large currency deposits or withdrawals into multiple increments, each amounting to less than $10,000, but totalling more than $10,000 when aggregated. These have come to be known, in jargon, as "structured transactions."

In this case, a bank customer presented a series of checks to the bank, no one of which exceeded $10,000. The checks, *totalling* over $10,000, were presented to the bank at the same time and to the same teller or tellers, who, in turn, permitted the customer to withdraw over $10,000 in cash. The bank tellers who took part in these transactions were indicted and tried for the offense of "willfully" failing to file currency transaction reports. These tellers were acquitted, having testified that they did not know that the transactions, under those circumstances, were reportable events. (See Pet. for Cert. at 5, n. 7 and citations therein.)

With respect to the bank itself, the trial judge instructed the jury that it could convict the bank under either of two theories: The bank would possess the requisite "knowledge" to be guilty of the offenses charged "if an employee knew of the requirement and willfully failed to file a report" (Pet. for Cert., Appendix D, A40). Alternatively, the judge instructed that the jury could convict the bank based upon "the sum of the knowledge of all of the employees." (*Id.* at A38). While possible, it is extremely unlikely that the bank was convicted under the first theory, since

the tellers were acquitted. It is more probable that the bank was found guilty under the "collective knowledge" theory, the propriety of which is a question of federal law of sufficient magnitude as to warrant the attention of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. There are member banks of the American Bankers Association located in each of the fifty states and the District of Columbia, including banks chartered by the Comptroller of the Currency (national banks) and banks chartered by the states in which they are located (state banks). As such, it frequently appears in litigation, either as a party or as amicus curiae, in order to promote or represent the interests of the commercial banking industry at stake in such litigation.

Prior to recent and appreciated "clarifications" of the Treasury Department's currency transaction reporting requirements (the regulations which required disclosure to Treasury of all cash transactions over $10,000), a number of banks suffered civil penalties (and this criminal conviction) for failure to guess correctly as to the meaning of the regulations. Even with such "clarifications" the currency transaction reporting requirements remain a matter of great concern to the industry.

Member banks of the American Bankers Association are subject to a multitude of regulatory obligations which have made a bank's compliance officer a

most critical position in every institution.[1] Commercial banks spend millions of dollars each year to train their employees and establish detailed programs for compliance with these regulatory obligations. The industry's compliance with regulations is also a matter of concern for Congress. For a six year period, banking's treatment of its obligations under the Bank Secrecy Act was a matter of regular Congressional attention, and the subject of various hearings and reports.[2] Yet at no point in this period has Congress ever indicated that "organizational indifference" can result in a will-

[1] The listing of regulatory requirements are voluminous and include: (a) Truth in Lending, Regulation Z; (b) Equal Credit Opportunity, Regulation B; (c) Consumer Leasing, Regulation M; (d) Electronic Funds Transfer Act, Regulation E; (e) Credit Practice Rule, Regulation AA; (f) Real Estate Settlement Procedures Act (RESPA), Regulation X; (g) Variable Rate Mortgages; (h) Fair Credit Reporting Act; (i) Fair Housing Act; (j) Community Reinvestment Act; (k) Home Mortgage Disclosure Act, Regulation C; (l) Funds Availability; (m) Truth in Savings Act; (n) Truth in Lending: Credit Card Application Disclosure. To address this critical area, the American Bankers Association has a National Compliance School and series of Compliance Seminars and Symposium designed to train compliance officers each year.

[2] *Statement of Honorable John M. Walker, Assistant Secretary for Enforcement and Operations, Department of the Treasury, Before the Subcommittee on General Oversight and Renegotiation of the House Committee on Banking, Finance and Urban Affairs* (July 13, 1982). H. R. Rep. 99-746, Comprehensive Money Laundering Prevention Act (1986). S. Rep. 99-433, The Money Laundering Crimes Act of 1986 (1986). H. R. Rep. 99-855, Money Laundering Control Act of 1986 (1986). President's Commission on Organized Crime, Interim Report, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984). As recently as May 6, 1987, the House Banking Subcommittee on Financial Institutions Supervision, Regulation and Insurance held hearings on the regulatory and enforcement agencies progress on money laundering.

ful violation of the statute. In contrast, Congress created a new lesser offense of "negligent" violations of the reporting requirements—in 1986. 31 U.S.C. Section 5321(a)(6). Organizational indifference is, however, the burden which will be imposed on the banking industry if the First Circuit's opinion is allowed to stand.

In addition, the potential reach of the First Circuit's unique theory of "collective knowledge" will result in the inability of bankers to establish compliance policies designed to prevent the prosecution of an institution for any number or variety of "specific intent" offenses where no single employee or agent has the necessary knowledge to satisfy a statutory requirement but an "aggregate" of knowledge is imputed to an institution. While the use of "collective knowledge" as a theory of corporate criminal liability casts a wide net, with the potential of ensnaring the entire business community, exposure of the banking industry to prosecution is of direct consequence to our association.

SUMMARY OF THE ARGUMENT

The reasons for granting a writ of certiorari in this case are well set forth in the petition. The decision in the First Circuit creates a new class of activities covered by the "collective knowledge" and "indifference" theories of corporate criminal liability. As more and more statutes are enacted to create and define banking crimes,[3] the theory of collective knowledge becomes dangerously expansive and could produce "nightmarish results."[4] As the Petitioner so clearly establishes, the decision "threatens convictions for negligent inaction not only under the currency transaction reporting laws, but also under every federal criminal statute that has until now been limited by standards of specific intent." Pet. for Cert. at 11. The resulting penalties for CTR violations (as well as the plethora of other banking regulations) are being imposed on the industry without any clear guidance to bankers and their counsel as to how to comply.

The recent adoption of criminal statutes affecting banking have subjected the industry to the potential for arbitrary government action. Collective knowledge or flagrant indifference theories of liability will force the industry to guess futilely at their obligations under the law. There can be no safe harbor from prosecution when well settled criminal standards are disregarded. In addition, these theories create the po-

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[3] *See, e.g.*, 18 U.S.C. 1956, 18 U.S.C. 1957, 18 U.S.C. 215, 18 U.S.C. 1344.

[4] *See* J. Villa, *Banking Crimes: Fraud, Money Laundering, and Embezzlement* (Clark Boardman & Co. 1987) § 6.05(3)(b). Villa describes the potential abuse of the theory under the newly enacted 18 U.S.C. 1957.

tential for direct conflict with the banking industry's long held obligations of protecting its customers privacy.[5]

ARGUMENT

Collective Knowledge

The First Circuit upholds a conviction of a bank for failure to file CTRs on cash withdrawals. The penalties imposed upon the bank could only be assessed for a *willful* violation of 31 U.S.C. Section 5322. The willfulness standard was found to be satisfied even though the bank's employees and its customer were found not guilty of failing to file CTRs on certain transactions. The court stretched all rational interpretation by explaining that: "[t]he bank is also deemed to know it [the CTR requirements] if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed." (Pet. for Cert., Appendix D, A38).

To comprehend fully the implications of this novel approach to corporate criminal liability, it is helpful to look at a recent interpretation of this standard:

> [E]mployee A in the compliance department at a bank's home office understood the filing requirement of the BSA [Bank Secrecy Act]; meanwhile,

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[5] The Right to Financial Privacy Act (RFPA), Title IX, Pub. L. No. 95-630, 92 Stat. 3641 codified at 12 U.S.C. §§ 3401-3422 (1982) is the major statute in this area but financial privacy is also governed by other federal law, state constitution and statutory law and the common law. *See, e.g., Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

> employee B, a teller in a branch office 50 miles away, conducted a reportable transaction but failed to recognize it as such and thus did not prepare a report; and employee C, the assistant branch manager in charge of filing Form 4789s with the IRS, did not file such a form because he was totally unaware that a reportable transaction had occurred. Although each element of the BSA offense has been satisfied by one or another of the employees of the bank, no individual intended to violate—or in fact violated—the law. Nevertheless, corporate liability could arguably be claimed to attach under a collective knowledge theory of BSA liability. This will not satisfy the requirement of a "willful" violation, as required by the BSA, unless the courts take the second step and allow aggregation of intent.[6]

As this example clearly illustrates, where (as in the BSA) "knowledge" is the sole mens rea element necessary, use of the collective knowledge standard can produce "nightmarish results." *Id.*

The disastrous implications of the collective knowledge theory are amply illustrated by its application to one of the several criminal statutes created during the last Congress. Under the new 18 U.S.C. Section 1957, any person who "knowingly" engages or attempts to engage in a monetary transaction involving criminally-derived property over $10,000 in value and derived from specified unlawful activity is subject to fine and imprisonment. There is only a knowledge requirement under section 1957. If the collective knowledge theory is upheld by this court, a bank could

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[6] Villa at § 6.05(3)(b) 6-58 to 6-59.

face criminal liability where one employee knew that an individual was in possession of criminally derived property (but not that the individual was, or would become, a bank customer) and another employee innocently conducted a transaction for the individual without knowing the source of funds.[7]

The First Circuit has departed from the decisions of other circuits with its adoption of the collective knowledge theory in the case of a specific intent crime. The only previous decisions utilizing this theory are cases where "public safety" was at issue.[8] As a matter of fact, the Second Circuit clearly addressed the use of the collective or "cumulative" knowledge theory in banking and rejected it out of hand (*as did the government*). In *United States v. Banco Cafetero Panama,* 797 F.2d 1154 (2nd Cir. 1986), the government brought an action for forfeiture of amounts in bank accounts as proceeds traceable to narcotics transactions. There, as in the case at bar, the statute in question contained a "knowledge" requirement.[9]

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[7] Villa at § 6.05(3)(b) 6-59. The author goes on to point out that the extremely harsh penalties under BSA make it unlikely that Congress wanted to punish violators under a collective knowledge theory for specific intent crimes.

[8] *United States v. T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730 (W.D. Va. 1974). *See also Inland Freight Lines v. United States,* 191 F.2d 313 (10th Cir. 1951); *United States v. Sawyer Transport, Inc.,* 337 F. Supp. 29 (D. Minn. 1971). For an extensive analysis of these cases, *see* K. Brickey, *Corporate Criminal Liability,* Vol. 3 § 4:05 at 93-97 (Callaghan & Co., 1984).

[9] The statute (21 U.S.C.§ 881) dealing with forfeiture provides in pertinent part: "All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in

The Court in *Banco* pointed out that it agreed with the government's concession that "the bank's knowledge . . . is *not* the cumulative knowledge of all the bank's employees." In fact, the court stated that: "[f]or a bank to be vulnerable to forfeiture of its cash, the fact that particular funds are immediate or traceable drug proceeds and the fact that those funds have been deposited at the bank must be known to the *same* employee of that bank." (emphasis added). In further support of the industry's position in the present case, the Second Circuit added: "banks need not engage in costly internal control procedures to ensure that one employee does not accept funds for deposit that another employee, who is unaware of the deposit, knows to be tainted." *United States v. Banco,* 797 F.2d at 1162.

Flagrant Indifference

As the argument above clearly demonstrates, the use of collective knowledge in the context of corporate criminal liability is untenable and should be rejected. Equally suspect is the district court's jury instruction which calls for a finding of willfulness where "flagrant indifference" by the bank is established.

If the court accepts the theory of flagrant indifference as a basis for liability in specific intent crimes,

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violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

the banking industry will not be able to comport with its well settled duty to maintain the confidentiality of customer information and bank records.[10] The threat of a charge of "organizational indifference" which could result in the imposition of severe penalties under several recently enacted statutes will force the industry to report all types of activities to the government.

The continued maintenance of a right to financial privacy will fall in the face of the governmental desire to receive all customer records for investigations,[11] The prosecutorial freedom that arises from easy access to records will result in chaos. The courts will be faced with increased litigation from customers who have had their records disclosed for a variety of reasons. This will fly in the face of Congressional intent, expressed in the Right to Financial Privacy Act, to protect customers of financial institutions from "unwarranted intrusion" into their financial records while, at the same time, permitting legitimate law enforcement activity.

Forcing corporations to choose between violation of customer privacy and being assessed heavy penalties for an "intentional" violation of law that the bank is powerless to prevent cannot be the goal of the gov-

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[10] Our association has long supported customer privacy. In 1940, the General Counsel of the American Bankers Association said: "A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification." (cited in *Milohnich v. First National Bank of Miami Springs*, 224 So.2d 759, 761 (Fla. Dist. Ct. App. 1969)).

[11] L. Richard Fischer, *The Law of Financial Privacy: A Compliance Guide* ¶ 2.01 (1983).

ernment. The First Circuit's decision failed to address these obvious concerns. That result must be overturned.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Writ should be granted.

Respectfully submitted,

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